

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

DONALD O. THOMPSON,)	
)	
Appellant,)	Case No 07SV-012
)	
v.)	DECISION AND ORDER AFFIRMING
)	THE DECISION OF THE LANCASTER
LANCASTER COUNTY BOARD OF)	COUNTY BOARD OF EQUALIZATION
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by Donald O. Thompson ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on February 21, 2008, pursuant to an Order for Hearing and Notice of Hearing issued December 17, 2007. Commissioners Wickersham, Warnes, and Salmon were present. Commissioner Hotz was excused from participation by the presiding hearing officer. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code ch.4 §11 (10/07). Commissioner Warnes was the presiding hearing officer.

Donald O. Thompson, was present at the hearing without legal counsel.

Michael E. Thew, a Deputy County Attorney for Lancaster County, Nebraska, was present as legal counsel for the Lancaster County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on

the record or in writing. The final decision and order of the Commission in this case is as follows.

I. ISSUES

Was the County Board's decision upholding the County Assessor's disqualification of the land described in this appeal for special valuation unreasonable or arbitrary?

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as S29, T12, R6, 6th Principal Meridian, Lot 11 SE, Lancaster, Nebraska, ("the subject property").
3. Prior to March 19, 2007, the County Assessor made a determination that the subject property should be disqualified for use of special valuation.
4. The Taxpayer protested that determination.
5. The County Board affirmed the determination of the County Assessor.
6. An appeal of the County Board's decision was filed with the Commission.
7. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
8. An Order for Hearing and Notice of Hearing issued on December 17, 2007, set a hearing of the appeal for February 21, 2008, at 3:00 p.m. CST.

9. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016 (7) (Supp 2007).
2. The Legislature may provide that agricultural land and horticultural land, as defined by the Legislature, shall constitute a separate and distinct class of property for purposes of taxation and may provide for a different method of taxing agricultural land and horticultural land which results in values that are not uniform and proportionate with all other real property and franchises but which results in values that are uniform and proportionate upon all property within the class of agricultural land and horticultural land. Neb. Const. art. VIII, §1 (4).
3. For purposes of sections 77-1359 to 77-1363:
 - (1) Agricultural land and horticultural land means a parcel of land which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land. Agricultural land and horticultural land does not include any land directly associated with any building or enclosed structure;
 - (2) Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science

and art of agriculture, aquaculture, or horticulture. Agricultural or horticultural purposes includes the following uses of land:

(a) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and

(b) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production;

(3) Farm home site means not more than one acre of land contiguous to a farm site which includes an inhabitable residence and improvements used for residential purposes, and such improvements include utility connections, water and sewer systems, and improved access to a public road; and

(4) Farm site means the portion of land contiguous to land actively devoted to agriculture which includes improvements that are agricultural or horticultural in nature, including any uninhabitable or unimproved farm home site. Neb. Rev. Stat. §77-1359 (Cum. Supp. 2006).

4. The Legislature may enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall for property tax purposes be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses. Neb. Const. art. VIII, §1 (5).
5. Agricultural or horticultural land which has an actual value as defined in section 77-112 reflecting purposes or uses other than agricultural or horticultural purposes or uses shall

be assessed as provided in subsection (3) of section 77-201 if the land meets the qualifications of this subsection and an application for such special valuation is filed and approved pursuant to section 77-1345. In order for the land to qualify for special valuation all of the following criteria shall be met: (a) The land is located outside the corporate boundaries of any sanitary and improvement district, city, or village except as provided in subsection (2) of this section; and (b) the land is agricultural or horticultural land. Neb. Rev. Stat. §77-1344 (1) (Supp. 2007).

6. The eligibility of land for the special valuation provisions is to be determined each year as of January 1, but if the land so qualified becomes disqualified on or before December 31 of that year, it shall be valued at its recapture value. Neb. Rev. Stat. §77-1344 (3).
7. Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel. Neb. Rev. Stat. §77-132 (Cum. Supp. 2006).
8. At any time, the county assessor may determine that land no longer qualifies for special valuation pursuant to sections 77-1344 and 77-1347. Neb. Rev. Stat. §77-1347.01 (Supp. 2007).
9. If land is deemed disqualified, the county assessor shall send a written notice of the determination to the applicant or owner within fifteen days after his or her determination, including the reason for the disqualification. Neb. Rev. Stat. §77-1347.01 (Supp. 2007).

10. A protest of the county assessor's determination may be filed with the county board of equalization within thirty days after the mailing of the notice. Neb. Rev. Stat. §77-1347.01 (Supp. 2007).
11. The county board of equalization shall decide the protest within thirty days after the filing of the protest. The county clerk shall, within seven days after the county board of equalization's final decision, mail to the protester written notification of the board's decision. Neb. Rev. Stat. §77-1347.01 (Supp. 2007).
12. The decision of the county board of equalization may be appealed to the Tax Equalization and Review Commission in accordance with section 77-5013 within thirty days after the date of the decision. Neb. Rev. Stat. §77-1347.01 (Supp. 2007).
13. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *Omaha Country Club v. Douglas County Bd. of Equalization*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
14. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
15. The presumption disappears if there is competent evidence to the contrary. *Id.*
16. Competent evidence means evidence which tends to establish the fact in issue. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

17. The Taxpayer has a burden to adduce evidence that the decision, action, order, or determination appealed from was unreasonable or arbitrary as prescribed by statute. *City of York v. York County Bd. of Equalization*, 266 Neb. 297, 664 N.W.2d 445 (2003)
18. The Commission may not grant relief unless it is shown that the action of the County Board was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006),
19. Proof that the action of the County Board was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
20. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
21. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
22. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).

IV. FACTS

The subject property is a 19.99 acre parcel which has been improved with a one story, 1,344 square foot house which was built in 1994. Exhibit 2:3. The Taxpayer and his wife

purchased the subject property June 30, 2004 for \$195,000. Exhibit 2:1. After their purchase, some improvements were made to the residence and to the parcel.

The Taxpayer testified that after purchase of the subject property he planted 7 to 8 apricot and apple trees in the southwest corner of the parcel. An aerial map of the subject property was offered and admitted into evidence. Exhibit 3:1. In addition, in 2006 he had planted 3 acres of raspberries, strawberries and blueberries in that portion of the parcel east of the entry way, but south of a line drawn east - west across the parcel through the center of the residence. Exhibit 3:1. The testimony of the Taxpayer was that from his planting of berries he intended to develop a "pick your own" berry business, but no berries would be available until the 2008 growing season.

The planting of 3 acres of berries, 7-8 fruit trees and 16 acres of grass for hay constitute use of almost the entire parcel for agricultural and horticultural uses, except for the one acre home site and a nominal home garden area west of the residence.

In addition to the agricultural and horticultural use that the Taxpayer has made of the subject property, other considerations were weighed by the Commission in deciding whether the agricultural use constituted "commercial production" of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture in accordance with Neb. Rev. Stat. §77-1359 (2) (Cum. Supp. 2006). The Taxpayer testified that he had personal knowledge and experiences growing berries since he had a background in farming from his family's farm where strawberries and an orchard had been grown. In addition, the Taxpayer had studied and researched the pursuit of pick your own commercial berry farming. The Taxpayer testified that he had kept records of his business. He

has taken steps to maximize production and has plans for the sale of the berries produced in 2007.

V. ANALYSIS

Only agricultural land and horticultural land as defined by the legislature is eligible for special valuation. Neb. Rev. Stat. §77-1344 (1) (Supp. 2007). The statutory definition of agricultural land and horticultural land contains various terms which are critical to an understanding of the statute. The term “parcel” has been defined by Nebraska’s Legislature. "Parcel means a contiguous tract of land determined by its boundaries, under the same ownership, and in the same tax district and section. Parcel also means an improvement on leased land. If all or several lots in the same block are owned by the same person and are contained in the same tax district, they may be included in one parcel." Neb. Rev. Stat. §77-132 (Cum. Supp. 2006).

Other significant terms within the statutory definition of agricultural land and horticultural land have not been defined by the Legislature. The term “commercial production” has not been defined but only land used for the “commercial production” of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture, with exceptions noted above, may be agricultural land and horticultural land. The Commission has not found in statute or in Nebraska case law a definition of the term “commercial production.” Commercial can mean “of, in or relating to commerce.” *Webster's Third New International Dictionary*, Merriam-Webster, Inc., (2002). p. 456. An alternate definition is “from the point of view of profit: having profit as the primary aim.” *Id.*

Prior to adoption of amendments to the statute defining agricultural land and horticultural land in 2006 the definition of agricultural and horticultural land contained a requirement that the land be used for the “production” of agricultural products. Neb. Rev. Stat. §77-1359 (Reissue 2003).

The new term “commercial production” did not appear in the definition. *Id.* A statute should be construed to give effect to purposeful change in its provisions. A construction of “commercial production” to mean production from the point of view of making a profit gives effect to the change in terminology as adopted by the legislature and is adopted by the Commission.

It is appropriate to consider a number of factors to determine whether or not an activity is undertaken with a view to making a profit. See, *Wood*, 548 T.M., *Hobby Losses*. Among the factors to be considered are: whether the activity is conducted in a business like manner with adequate records and adaption of operating methods to changing circumstances; expertise of the Taxpayer, if any, necessary for conduct of the operation; consultation with experts, if necessary, and reliance on appraisals or other data for decision making as necessary; time and effort expended by the Taxpayer in furtherance of the operation; any expectation of appreciation in the assets employed in the operation; success the Taxpayer has had in carrying on similar or dissimilar operations; the Taxpayer’s history of profits or losses with respect to the operation discounting startup losses and losses or gains due to unusual circumstances; any profits earned and the possibility of profits if none have been earned to date; the Taxpayer’s financial status i.e. the ability to sustain losses or incur costs without regard to returns; and elements of personal pleasure or recreation, or other motives other than profit or gain. The same factors are relevant to a determination of whether commercial production of a plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or

horticulture (“commercial production”) has occurred on the parcel. In addition the Commission will consider other factors as presented on a case by case basis.

Brome grass was grown on approximately 16 acres in that area of the parcel north of the line referred to above. The grass had been cut once per year since purchase and the receipts shown by Exhibit 10 show that \$600 dollars were received for 2005 and \$610 for 2006. The IRS Schedule F provided as evidence by the Taxpayer does not list the 2006 income. Exhibit 6:4 and 6:5. No profit has been obtained by the Taxpayer from his agricultural pursuits as of January 1, 2007.

The Taxpayer has consulted with other berry producers and experts. In addition, the Taxpayer has experience and personal knowledge in the growing of berries. The Taxpayer has taken steps to maximize production and upon further planting of berries his revenue from the berry production is expected to increase.

Based on the Taxpayer’s evidence, the Commission concludes that the 18.99 acres of land not comprising the home site (one acre, Exhibit 2:1) was being used by the Taxpayer for commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art agricultural, aquaculture, or horticulture as required by statute, Neb. Rev. Stat. § 77 - 1359 (Supp. 2007). Upon this finding of commercial production, the Commission must review one additional requirement before finding that the 18.99 acres qualifies for special value. This additional requirement is whether the entire parcel consisting of 19.99 acres is primarily used for agricultural or horticultural purposes. Neb. Rev. Stat. §77-1359 (1) (Supp 2007).

Section 77-1359 of Nebraska statutes requires a determination that the primary use of a parcel be for commercial production before it can be deemed agricultural land and horticultural land. There are 18.99 acres of the subject property which are used for commercial production; the balance of the parcel is used for residential purposes. Given the definition of parcel found in section 77-132 of Nebraska Statutes and the use of that term in section 77-1359 of Nebraska statutes, it is clear that the parcel as a whole is to be considered when determining whether or not a parcel is agricultural land or horticultural land. The remaining question is then whether the subject property (parcel) is primarily used for the commercial production of a plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture. Primarily can be defined as first of all or in the first place. *Webster's Third New International Dictionary*, Merriam-Webster, Inc., (2002). p. 1800. Primary can be defined as the “first in rank or importance.” Id.

“Value can have many meanings in real estate appraisal: the applicable definition depends on the context and usage. In the market place value is commonly perceived as the anticipated benefits to be received in the future.” *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001) p 20. “The economic concept of value is not inherent in the commodity, good, or service to which it is ascribed; it is created in the minds of the individuals who make up the market.” Id p 29. Typically four independent factors create value; utility, scarcity, desire, and effective purchasing power. Id p. 29. “Utility is the ability of a product to satisfy a human want, need or desire.” Id. p 29. “Scarcity is the present or anticipated supply of an item relative to the demand for it.” Id. p 30. “Desire is a purchaser’s wish for an item to satisfy human needs (e.g., shelter, clothing, food, companionship) or individual wants beyond the essential required to

support life.” Id. p 30. “Effective purchasing power is the ability of an individual or group to participate in a market ---- that is, to acquire goods with cash or its equivalent.” Id. p 30. The value of a parcel of real estate is the sum of its component parts. *See, The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001). “The value of owner-occupied residential property is based primarily on the expected future advantages, amenities, and pleasures of ownership and occupancy.” *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, (2001) p. 35. “The value of income-producing real estate is based on the income it will generate in the future.” Id. In the context of this appeal if greater utility is assigned to a use it will have a greater value. Greater value is then an indicator of the primary use of the parcel. Actual values of components of the subject property as determined by the County Assessor as of January 1, 2007, were not disputed. The total actual value of the residence, farm utility building, and their sites as determined by the County Assessor was \$237,792. Exhibit 2:1. Actual value of the 18.99 unimproved acres was \$56, 970. Exhibit 2:1. The assessed valuation for the house for 2007 is \$152,822. Exhibit 2:1. The one acre home site on which the house is located is assessed by the County for 2007 for \$28,000 making the total assessed valuation for the residence and home site for 2007 the total amount of \$180,822 (\$152,822 + \$28,000). Exhibit 2:1.

From the above analysis, these relative values do not indicate that the primary or most important use of the parcel is for commercial production or that it is primarily used for that purpose.

The acres devoted to differing uses on the parcel are 18.99 acres for commercial production. Exhibit 2:1. There are 19.99 acres in the subject property. Exhibit 2:1. The fact

that the number of acres used for commercial production exceeds the number of acres used for all other purposes indicates that commercial production is the primary use of the parcel.

The Property Tax Administrator, in Directive 07-01, advised that criteria other than area could be applied. Exhibit 21:3. The Property Tax Administrator also advised that “primarily used” meant “for the most part” and that case law usually referred to “primarily” as more than 51%. Exhibit 21:3. A comparison of the size of areas of use within a parcel is suited to use of the “for the most part” and “51%” criteria. The Property Tax Administrator, in Directive 07-01, indicated that other criteria uniformly applied could be used. Other factors such as the relative values of the components of the subject property strongly indicate that the most important or primary use of the parcel is for residential purposes.

The factors considered in this appeal to determine the primary use of the parcel are based on the facts presented. When all of the factors in this appeal are weighed they do not indicate that the primary use of the subject property is commercial production.

Factors in addition to those discussed in this appeal may be presented in other appeals and will be considered as presented. It is however the consideration of all factors as applicable for each parcel rather than reliance on a single factor that is necessary to make a reasonable determination of primary use for a parcel.

The Commission finds that the Taxpayer has not produced clear and convincing evidence that the decision of the County Board’s decision was arbitrary or unreasonable in its refusal to reverse the decision of the County Assessor. This standard of review of arbitrary and unreasonable is found in Neb. Rev. Stat. §77-5016 (8) (Supp. 2007). The burden of proof, clear

and convincing evidence, is not found in statute, but is found in case law. *Omaha Country Club v Douglas County Bd. Of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

The appeal of the Taxpayer is denied.

V.

CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining that the subject property was not eligible for special valuation is affirmed.
2. This decision, if no appeal is timely filed, shall be certified to the Lancaster County Treasurer, and the Lancaster County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
3. Any request for relief, by any party, which is not specifically provided for by this order is denied.
4. Each party is to bear its own costs in this proceeding.

5. This decision shall only be applicable to tax year 2007.
6. This order is effective for purposes of appeal on March 4, 2008.

Signed and Sealed. March 4, 2008.

Wm. R. Wickersham, Commissioner

Nancy J. Salmon, Commissioner

William C. Warnes, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.